IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 775 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PADMANABH SILK MILLS

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 775 of 2002
MR PARESH M DAVE for Petitioner No. 1-2
MR JM MALKAN for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 07/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. Petitioner No.1 - M/s. Padmanabh Silk Mills,

partnership firm, and its partner Shri Navnitbhai Nathubhai Gandhi, petitioner No.2, have filed this petition before this Court under Article 226 of the Constitution and prayed that a writ of mandamus or in the nature of mandamus or any other appropriate writ, direction or order be issued to the respondents and the decision of the respondent - Authority dated 29.8.2001 (Annexure : I) be quashed and set aside and the respondents be directed to pay interest to the petitioners at the rate of 15 % p.a. on the refund amount for the period from 22.2.1997 to 18.11.1999.

2. The Commissioner of Central Excise & Customs, Vadodara, passed an Order in Original on 29.1.1997 confirming certain amount of duty and penalties imposed on the petitioner firm. Against the said order passed in OIO, the petitioner firm filed Appeal and Stay Application before CEGAT wherein common stay order dated 22.9.1992 was passed by the CEGAT directing the petitioner firm to deposit Rs.4 lacs in cash as condition for hearing of Appeal on merits (Annexure : A). Accordingly, the petitioner had deposited Rs.4 lacs by way of pre-deposit before the concerned Authority. Thereafter, the Appeal of the petitioner was finally allowed by CEGAT and the impugned order of duty and penalty imposed on the petitioner firm by the Commissioner, Central Excise & Customs, Vadodara, was quashed and set aside, vide order dated 5.8.1996.

3. Thereafter, on 22.11.1996, the petitioners filed refund claim (Annexure : B collectively) before the Assistant Commissioner, Central Excise, Div.IV, Surat. It is the case of the petitioners that their refund claim Application was not decided by the respondents on the ground that they wanted to approach this Court, therefore, the petitioners were constrained to approach this Court by way of Special Civil Application No.5027/97 which was disposed of on 6.10.1997 (annexure : C) by the Division Bench of this Court, directing the respondents to decide their refund claim Application, in accordance with law, within 3 months from the date of the order.

The Assistant Commissioner, Central Excise, Div.II, Vapi, by his order dated 5.1.1992 (Annexure : D) rejected the refund claim Application on the grounds stated in it. Aggrieved of the same the petitioners filed Appeal before the Commissioner of Central Excise & Customs (Appeals), Vadodara, which was later on transferred to the Commissioner (Appeals), Surat and the said Appeal was allowed on 25.2.1999 (Annexure : E).

4. It is the case of the petitioners that even though their Appeal was allowed by the Commissioner (Appeals), the respondents did not take any action and refunded the amount of pre-deposit to the petitioners. In fact, one more show cause notice was issued by the Authority calling upon the petitioner as to why the refund claim for Rs.4 lacs should not be rejected (Annexure : F). However, after considering the reply of the petitioners, Notice was ordered to be discharged and a Certificate dated 25.11.1999 (Annexure : G) was issued by the Bank of Baroda in favour of petitioners, certifying that cheque dated 18.11.1999 for Rs.4 lacs was deposited in their Accounts by the Authority.

5. Once the refund claim of the petitioners was accepted by the respondents and the cheque of Rs.4 lacs is deposited in favour of the petitioners, the petitioners by letter dated ___/12/1999 (Annexure : H) requested the Dy.Commissioner, Central Excise, Valsad, to award interest on delayed refund amount of Rs.4 lacs u/s.11-B(2) of the Central Excise Act. However, by impugned order dated 29.8.2001, the Superintendent, Central Excise, Range : X, Navsari, under the direction of the Dy.Commissioner, Central Excise, Valsad, informed the petitioner that they were not entitled to get interest on deposit in this case u/s.11(BB) of the Central Excise Act, 1944, which provides for interest for delayed refund of duty and not of deposit. Hence, this petition.

6. Shri Dave, learned Counsel for the petitioner submitted that the petitioner No.1 firm was obliged to deposit the amount of Rs.4 lacs by way of pre-deposit towards duty in Appeal before the Appellate Authority as per conditional stay order passed by the Appellate Authority, therefore, the impugned communication at Annexure : I is wholly misconceived and liable to be quashed and set aside. He submitted that the petitioner firm had deposited the amount of Rs.4 lacs by way of pre-deposit u/s.35-F of the Central Excise Act and when their Appeals were allowed by the Appellate Authority then they were required to refund the amount of pre-deposit immediately. Instead of that, the Authority waited for a period of almost 3 years and finally refund the amount which was deposited by them by way of pre-deposit. He, therefore, submitted that irrespective of the provision of Section 11(BB), the petitioners were even otherwise entitled for the interest of almost 3 years on belated refund. In support of his submission Shri Dave placed reliance on the Judgment of Madras High Court in the case of OSWAL AGRO MILLS LTD. v/s UNION OF

INDIA, reported in 2000 (115) E.L.T.302 (Mad.), which is annexed to this petition at Annexure : K. It is a Judgment of the Single Judge of Madras High Court, delivered in writ petition filed by the petitioner claiming refund of Rs.12.5 lakhs u/s.129E of the Customs Act and also for releasing the Bank Guarantee of Rs.12.5 lakhs. Having carefully gone through the Judgment of the Madras High Court in Oswal Agro Mills Ltd. (Supra), it appears that the order passed against the petitioner was set aside by the CEGAT. Therefore, the learned Single Judge of the Madras High Court was of the opinion that once the order was set aside by the CEGAT then it automatically follows that the respondents could have sent advise intimating the refund of the pre-deposit made by the petitioner, which they have not done and that at every stage the respondents had been adopting the delaying tactics. Therefore, the petition was allowed and the respondents were directed to refund sum of Rs.12.5 lakhs and also to return the Bank Guarantee of Rs.12.5 lakhs within six weeks from the date of the order with interest at 15 % per annum from the date when the reference Application submitted by the Authority came to be rejected.

7. Shri Dave has then relied upon the Division Bench Judgment of the Bombay High Court in the case SUVIDHE LTD. v/s. UNION OF INDIA, reported in 1996 (82) E.L.T. 177(Bom.). In that case the show cause notice was issued by the Superintendent (Tech.), Central Excise, to the petitioner to show cause why the refund claim for Excise Duty and Redemption fine paid in a sum of Rs.14,07,410/should be denied u/s.11B of the Central Excise Rule and Act, 1944, which was deposited by the petitioners, not towards Excise Duty, but by way of deposit u/s.35F for availing the remedy of an Appeal. By the said show cause notice the petitioner also called upon to show cause as to why the amount deposited should not be forfeited. It appears from the Judgment of the Bombay High Court in Suvidhe Ltd. (Supra) that the Appeal was allowed by the Appellate Tribunal and, therefore, the Bombay High Court held that claim of the Department in show cause notice was thoroughly dishonest and baseless as, according to the Bombay High Court in respect of deposit made u/s.35-F of the Central Excise Act, 1944, the provision of Section 11B can never be applicable and a deposit u/s.35F was not a payment of Duty but only a pre-deposit for availing the right of appeal and, therefore, such amount was bound to be refunded when the Appeal is allowed with consequential relief. Accordingly, the Bombay High Court has allowed the petition and by quashing and setting aside the

impugned show cause notice the respondents were directed to refund the amount of Rs.14,07,410/- along with interest thereon at the rate of 15 % p.a. from the date of the order of Tribunal, till the payment was made.

8. Shri Dave also relied upon the Single Bench Judgment of M.P. High Court in the case of HOPE TEXTILES LTD. v/s. UOI, reported in 2000 (90) ECR 452 (MP), wherein notwithstanding the order of refund made by the Appellate Authority, the respondents were not refunding the amount till 12.4.1989, the day on which the cheque for refund amount was given. It appears from the Judgment of the learned Single Judge of MP High Court in Hope Textiles (supra) that reliance was placed on the Supreme Court Judgment in the case of ELPRO INTERNATIONAL LTD. & ORS. v/s. JOINT SECRETARY, GOVERNMENT OF INDIA, reported in 1985 (19) ELT 3 (SC), wherein the Apex Court held that "Since in the instant case, excise duty was wrongly collected in 1966 and the amount was refunded in May, 1977, therefore, it will neither be harsh nor unjust if an amount of Rs.50,000/- is paid by the Union to the Respondent company on account of such interest together with the amount of costs." Accordingly, the petition was allowed with 12 % interest on the refund claim.

9. Shri Dave then relied on the larger Bench Judgment of the Tribunal itself in the case of ARTI STEEL LTD. v/s. COMMISSIONER OF C.EX.CHANDIGARH, reported in 2003 (155) E.L.T. 189 (Tri.-LB). The question before the larger Bench of the Appellate Tribunal was whether the appellants were entitled to claim interest on pre-deposit? which was already decided by the Apex Court in the case of KUIL FIREWORKS INDUSTRIES v/s. CCE - 1997 (95) E.L.T.3 (SC). Relying on the Judgment of the Hon'ble Supreme Court, the larger Bench of the Appellate Tribunal directed the Revenue to pay interest on the amount of Rs.15 lakhs.

In Kuil Fireworks Industries Case (supra), the Appeal was filed before the Hon'ble Supreme Court against the Judgment of CEGAT by the appellant Kuil Fireworks Industries. While allowing the Appeal and quashing and setting aside the impugned Judgment of CEGAT and also quashing and setting aside the demand raised by the Assistant Collector, Central Excise, on the basis of the show cause notice, the Hon'ble Supreme Court awarded interest at the rate of 12% on the amount of 1,50,000/- which was paid by the Appellant towards duty and also on the Bank Guarantee of Rs.1,50,000/-.

10. Coming to the facts of the instant case it is

clear that refund claim of the petitioners was already allowed finally on 18.11.1999 and they were also paid the cheque of Rs.4 lacs which was deposited by them by way of pre-deposit in Appeal. It is no doubt true that there was a delay in refunding the same. However, from their Application claiming interest on the belated refund amount (Annexure : H) it appears that they have specifically claimed interest on delayed refund amount u/s.11-B(2) of the Central Excise Act, 1944, which was rejected by the Authority on the ground that Section 11(BB) of the Central Excise Act, 1944, provided interest of delayed refund on duty and not on deposit. Therefore, we have to first consider the provision of Section 11(BB) and Section 11B(2) of the Central Excise Act, 1944, which are as under :

SECTION (11BB - INTEREST ON DELAYED REFUNDS -

If any duty ordered to be refunded under sub-section (2) of Section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate (not below five per cent) and not exceeding thirty percent per annum as is for the time being fixed (by the Central Government, by Notification in the Official Gazette), on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty ordered to be refunded under sub-section (2) of Section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation - Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any court against an order of the (Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise), under sub-section (2) of Section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said

sub-section (2) for the purpose of this section).

SECTION 11B. CLAIM FOR REFUND OF DUTY - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the (Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise) before the expiry of (one year) (from the relevant date) (in such form and manner) as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12a) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section, as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act):

(Provided further that) the limitation of (one year) shall not apply where any duty has been paid under protest.

(2) If, on receipt of such application, the (Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise) is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty of excise as determined by the (Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise) under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods reported out of India or on excisable materials used in the

manufacture of goods which are exported out of India.

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the (Commissioner of Central excise);

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacture, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the official Gazette, specify;

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

11. From the above, it is clear that u/s.11B(2) of the Central Excise Act, 1944, on making an Application for refund u/s.11B(2) the concerned Authority must be satisfied that whole or part of any duty of excise paid by the applicant is refundable or not and on he being satisfied, he has to pass order accordingly and the amount so determined shall have to be credited to the fund subject to the provision of Section 11(2). If there is a delay of refund then interest has to be awarded u/s.11(BB) of the Act.

Thus, from the bare reading of Section 11(B)(2) and 11(BB) of the Act, it is clear that if the concerned Authority satisfied with the case of the applicant of refund then it is to be paid within 3 months from the date of receipt of the Application and if it is not paid then the interest has to be paid on it u/s.11(BB) of the

Act.

12. In view of the above, we are of the considered opinion that the Authority has not committed any error while rejecting the claim of interest on the deposit by an order dated 29.8.2001 (Annexure : I). However, the submission of Shri Dave for the petitioner was that he was required to deposit amount of Rs.4 lacs by way of pre-deposit in view of the conditional order passed on Stay Application filed in Appeal which was towards the duty itself. In our considered opinion, the provision of section 35(F) of the Central Excise Act, 1944 are meant totally for a different purpose. It is only with a view to see that frivolous Appeals are not entertained, therefore, the order of pre-deposit of duty demanded or penalty levied is passed by the Appellate Authority while granting conditional stay. In the instant case also the petitioners were directed to pay, not only the duty, but also the penalty, therefore, the petitioners cannot claim interest on refund. Interest on refund can be awarded only under the provision of Section 11(BB) of the Act when there is a delay on the part of the Authority even after the order of refund was passed, otherwise not.

13. In view of the above, we are of the considered opinion that larger Bench of the CEGAT, without considering all this aspect, mechanically passed an order relying on the Judgment of the Apex Court in Kuil Fireworks Industries (Supra). We have also set out the principles and the facts of Kuil Fireworks Industries Ltd.'s case and at the cost of repetition we may state that the issue was never before the Hon'ble Supreme Court which is raised in this petition. The Hon'ble Supreme Court allowed the Appeal against the impugned order passed by CEGAT and there it had awarded interest. We fail to appreciate that how the Hon'ble Supreme Court Judgment in Kuil Fireworks (supra) will have any application. In our considered opinion the larger Bench of the CEGAT, without properly applying itself, might have followed that Judgment and held that the department was bound to pay interest on the belated claim of refund u/s.11(BB) of the Act.

14. This brings us to the Judgment of the learned Single Judge of MP High Court in the case of HOPE TEXTILES LTD. (supra). The learned single Judge, without considering the provisions of either Section 11(BB) or 11-B(2) of the Act straightway allowed the writ petition on the basis of the Hon'ble Supreme Court Judgment in the case of ELPRO INTERNATIONAL LTD. v/s. JOINT SECRETARY, GOVERNMENT OF INDIA, reported in 1985

(19) ELT 3 (SC), wherein the Hon'ble Supreme Court has held that..."Since in the instant case, excise duty was wrongly collected in 1966 and the amount was refunded in May, 1977, therefore, it will neither be harsh nor unjust if an amount of Rs.50,000/- is paid by the Union to the Respondent Company on account of such interest together with the amount of costs."

The same is the case with the Judgment of the learned Single Judge of Madras High Court delivered in OSWAL AGRO MILLS LTD. (supra), where the learned Single Judge of the Madras High Court, without considering the provisions of either Section 11(BB) or 11B(2) allowed the writ petition only on the ground of delay at every stage on the part of the respondents.

15. This brings us to the Division Bench Judgment of the Bombay High Court in the case of SUVIDHE LTD.(Supra). It is no doubt true that the Bombay High Court considered Section 35(F) and 11(B), but surprisingly, without any discussion, the Bombay High Court held that in respect of deposit made u/s.35(F) the provision of Section 11(B) can never be made applicable. If that is so, then the case of the petitioner falls.

16. In view of the above discussion, we are of the considered opinion that when specific application is made u/s.11B(2) of the Central Excise Act, 1944 for interest on belated refund then the same has to be considered and decided by the Authority in light of the provisions of Section 11B(2) as well as section 11(BB) of the Act, 1944. As Section 11(BB) of the Act provides interest for delayed refund of duty and not of deposit, therefore, in our considered opinion the respondent - Authority was right in rejecting the claim of interest on the delayed refund by its impugned order dated 29.8.2001 (Annexure:I).

17. In view of the above discussion, this petition fails and is hereby dismissed. Rule discharged. However, there shall be no order as to costs.

(B.J.Shethna, J.)

Date : October 07, 2004

(Sharad D.Dave, J.)

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